

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 24**

HOSPITAL RYDER MEMORIAL, INC.

Employer

and

Case No. 24-RC-8625

UNION INSULAR DE TRABAJADORES  
INDUSTRIALES Y CONSTRUCCIONES  
ELECTRICAS, INC. (UITICE)

Petitioner

**DECISION AND DIRECTION OF ELECTION**

On January 26, 2009, Union Insular de Trabajadores Industriales y de Construcciones Electricas, Inc. (UITICE), herein called “the Petitioner,” filed a petition under Section 9(b) of the National Labor Relations Act, as amended, seeking to represent a unit of all the Registered Nurses employed by the Employer at its acute care facility in Humacao, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.<sup>1</sup> The Employer has RNs in several different departments, including the Nursing Department, the skilled nursing facility (known as

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<sup>1</sup> The record shows that the Employer also has facilities located in Yabucoa and San Lorenzo, Puerto Rico. During the hearing, the Petitioner stated that it did not seek to include in the petitioned-for unit any RNs located in Yabucoa and San Lorenzo. The Employer has not sought to include those RNs in the unit and, indeed, takes the position that the petition should not encompass those other locations. In the absence of any contention that the unit should include the facilities in Yabucoa and/or San Lorenzo, the petitioned-for appropriate unit is limited to the Employer’s facility in Humacao. See, e.g., Mercy Sacramento Hospital, 344 NLRB 790, 790 (2005) (single-facility unit in health care industry acute care hospital setting is presumptively appropriate, and presumptive appropriateness of single-facility unit can be rebutted only by demonstrated integration that is so substantial as to negate the separate identity of the single facility).

“Casa de Salud”), Home Health Services, External Clinics, the CIS Project, Preventive Medicine, Preadmissions, the Nursing School, and the Cardiovascular Lab. The Nursing Department has approximately 150 RNs, which is the highest number of RNs in all of the departments; the other departments have many fewer RNs. On 13 days from February 11 through March 9, 2009, a hearing officer held a hearing on the petition.

The parties agree that an issue to be decided is whether its RNs are statutory supervisors within the meaning of Section 2(11) of the Act. The Employer’s position is that the RNs in all departments except for the Cardiovascular Lab are statutory supervisors based on their authority over subordinate employees such as Licensed Practical Nurses and other staff members. In contrast, the Petitioner’s position is that the RNs are employees who do not exercise true supervisory authority.

Additionally, the Employer has RN Head Nurses in the Nursing Department, Casa de Salud, and the CIS Project. The Employer contends that those Head Nurses exercise supervisory authority, even if the RNs generally do not. At the hearing, the Petitioner contended that the Head Nurses are not supervisors. In its posthearing brief, however, the Petitioner stated that the Employer had demonstrated that the Nursing Department Head Nurses are supervisors. The Petitioner did not state in its brief whether it had changed its position regarding the Head Nurses who work at Casa de Salud and the CIS Project. Accordingly, the issue of the supervisory status of the Head Nurses must be discussed.

The Employer also has advanced the contention that some or all of the Head Nurses and RNs are managerial employees. The Petitioner’s position is that they are not managers.

Additionally, the parties have a dispute about two specific positions that require an RN license but which involve work that is different from the work of the regular RNs. Those two positions are the Nursing Department's Instructor for Patient Education and the Preadmissions RN. The Petitioner seeks to have the Instructor for Patient Education and the Preadmissions RN included. In contrast, the Employer seeks to have the Instructor for Patient Education excluded because the position is supervisory and/or managerial and it does not involve direct patient care. The Employer seeks to exclude the Preadmissions RN on the grounds that she is a statutory supervisor, based on her oversight of an LPN and on her substitution for the regular head of the department.

Moreover, at the hearing the parties stipulated to exclude from the petitioned-for unit several other positions that require an RN license but which do not involve direct patient care. Those positions are the following: the Nursing Department's Personnel Development Coordinator and Instructor for Employee Development; Casa de Salud's MDS Coordinator and Quality Improvement Coordinator; and the Nursing School Instructors. There is an issue as to whether those stipulations should be approved.

As discussed further below, my conclusions are as follows. I conclude that the Head Nurses in the Nursing Department and Casa de Salud are supervisors, but that the Head Nurse in the CIS Project is not a supervisor. Also, I conclude that the non-Head Nurse RNs in all the departments are not supervisors. I conclude that neither the Head Nurses nor the RNs are managerial employees. With regard to the Nursing Department's Instructor of Patient Education, I conclude that she is not a supervisor or a managerial employee and that she will be included in the petitioned-for unit. As for the

Preadmissions RN, I will allow her to vote subject to challenge, in light of uncertainty regarding her service as a substitute supervisor. Additionally, I conclude that the parties' above-described stipulations to exclude specified positions should be honored, and that those positions will be excluded.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding,<sup>2</sup> I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is a Puerto Rico corporation with a place of business in Humacao, Puerto Rico, where it is engaged in the operation of an acute care hospital providing medical, surgical, and related health care services. During the twelve month period preceding the commencement of the hearing, the Employer had gross revenues derived from its operations in excess of \$250,000 and received materials and supplies in excess of \$50,000 from points and places located outside the Commonwealth of Puerto Rico. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the Board's jurisdiction.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section

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<sup>2</sup> The Employer filed a motion to strike the Petitioner's exhibits on the grounds that the Petitioner did not submit translations by the due date. That motion is denied. The Hearing Officer received the Petitioner's exhibits at the hearing and made them part of the record. Although the Agency has the responsibility to provide translations in Representation proceedings, here, the parties agreed to handle translations themselves. Any Petitioner delay in submitting translations does not warrant striking exhibits from the record. Additionally, no party has been prejudiced by any delay.

2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:<sup>3</sup>

All Registered Nurses employed by the Employer at its acute care hospital located in Humacao, Puerto Rico, including the Nursing Department's Instructor for Patient Education and the CIS Project's Head Nurse; but excluding all other employees, the Nursing Department's Personnel Development Coordinator and Instructor for Employee Development, Casa de Salud's MDS Coordinator and Quality Improvement Coordinator, the Nursing School Instructors, guards, and supervisors as defined in the Act, including the Nursing Department's and Casa de Salud's Head Nurses.<sup>4</sup>

### **INTRODUCTION**

The Petitioner here seeks to represent a unit of RNs at the Employer's facility in Humacao, Puerto Rico. Because the Employer's facility is an acute care hospital, the petition is governed by a Board rule governing appropriate bargaining units in such facilities.

Prompted by longstanding disputes over hospital bargaining unit determinations, the Board engaged in notice and comment rulemaking from 1987 to 1989 in an attempt to formulate a general definition of the bargaining units appropriate in the health care industry. See generally 52 Fed. Reg. 25142 (1987); 53 Fed. Reg. 33900 (1988); 54 Fed. Reg. 16336 (1989). In May 1989, that process culminated in the Board's issuance of a rule that generally provides that eight specifically defined units would be "the only appropriate units" in acute care hospitals, except in "extraordinary circumstances," in

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<sup>3</sup> The Petitioner stated that it is willing to proceed to an election in any unit found to be appropriate.

<sup>4</sup> The Preadmissions RN is neither included nor excluded. She may vote subject to challenge, and her status can be determined subsequently as appropriate under Board law.

circumstances involving “existing non-conforming units,” and where labor organizations sought to combine two or more specified units. 29 C.F.R. Section 103.30.

The eight appropriate units are (1) all registered nurses, (2) all physicians, (3) all professionals except for registered nurses and physicians, (4) all technical employees, (5) all skilled maintenance employees, (6) all business office clerical employees, (7) all guards, and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.<sup>5</sup> 29 C.F.R. Section 103.30(a). The Supreme Court upheld the validity of the rule. See American Hospital Ass’n v. NLRB, 499 U.S. 606, 617 (1991).

With regard to the Board’s decision to make a unit of all RNs one of the eight permissible units, the Board referred to several supporting factors. The Board deemed such a unit to be appropriate because, for example, RNs have responsibility for direct patient care, similar work schedules, common supervision, frequent interaction with each other, a history of separate organization and bargaining, and similar education, training, experience, and licensing requirements. See 52 Fed. Reg. 25146; 53 Fed. Reg. 33911-33917.

As stated above, the Employer contends that its RNs are statutory supervisors who cannot be included in a bargaining unit. Section 2(3) of the Act excludes “any individual employed as a supervisor” from the Act’s definition of “employee,” thereby excluding supervisors from the Act’s protections. Consequently, under the Act, the Board is prohibited from including statutory supervisors in a bargaining unit. Thus, even

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<sup>5</sup> The Board’s rule does not invalidate the single-facility presumption applicable to acute care hospitals. In the rulemaking proceeding, the Board stated that it intended to resolve through adjudication the issue of the appropriateness of a single location facility where an employer owns a number of facilities. See 53 Fed. Reg. 33903.

though a petitioned-for unit of RNs in an acute care hospital generally must include all RNs, if some or all of the petitioned-for RNs are statutory supervisors they must be excluded.

Similarly, the Board cannot include managerial employees in a bargaining unit. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

Additionally, as discussed above, the parties' stipulated to exclude from the unit the following positions: the Nursing Department's Personnel Development Coordinator and Instructor for Employee Development; Casa de Salud's MDS Coordinator and Quality Improvement Coordinator; and the Nursing School Instructors. Section 103.30(d) of the Board's rule on bargaining units in acute care hospitals provides that "nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable." In the rulemaking proceeding, the Board stated that it "[had] been persuaded that permitting non-conforming stipulations, which are not prohibited by the Act, may, in many instances, better serve the interests of the parties, and perhaps even the Board." 53 Fed. Reg. 33931. The Board observed that it generally permitted parties to stipulate to the appropriateness of units and to various inclusions and exclusions if the agreement does not violate any express statutory provision or established Board policy. Id.; see also Highlands Regional Medical Center, 327 NLRB 1049, 1050 (1999) (discussing the Board's policy allowing non-conforming stipulations in acute care hospitals). Consequently, parties' stipulations should be honored, unless they are contrary to the Act or Board policy.

## **FACTS**

### **A. Background; the Upper Management; the Existing Units Represented by the Petitioner**

The Employer's facility in Humacao has approximately 1000 employees, employed throughout several departments. The hospital's Executive Director is Jose Feliciano Sepulveda. The Executive Director reports to the hospital's board of directors, which is the main governing body. The hospital's Administrator is Nemuel Artiles Montalvo. Artiles has responsibility for several of the departments that use RNs, including the Nursing Department.

The Petitioner currently represents two bargaining units of the Employer's employees. See Ryder Memorial Hospital, 351 NLRB 214 (2007) (certifying the results of elections in two stipulated units). One of the units consists of the Employer's professional employees (excluding RNs), and the other unit consists of its non-professional employees.

### **B. The Nursing Department**

#### **1. The Nursing Department's Upper Management**

The Director of the Nursing Department is Aracelis Burgos Rodriguez. She is in charge of the management, planning, organization, and direction of the Nursing Department. She is involved in staffing, work schedules, vacation plans, and various other personnel matters. Burgos Rodriguez reports to Administrator Artiles Montalvo. Her usual working hours are 8:00 a.m. to 5:00 p.m., Monday through Friday.

The Nursing Department also has a "Sub-Director" - also referred to as an Associate Director or Assistant Director of Nursing - who serves under Director Burgos Rodriguez. The Sub-Director is Daisy Aponte Rosado. Aponte Rosado assists the



Director and fills in as Director when Burgos Rodriguez is away. Aponte Rosado's work hours are from 7:00 a.m. to 4:00 p.m., Monday through Friday.

The Nursing Department has several subdivisions: Medical/Surgical, Emergency Room, Intensive Care Unit, Newborn/Neonatal Intensive Care Unit, Labor/Delivery, Operating Room, OB-GYN/Pediatrics, and Personnel Development. Each of the Nursing Department's subdivisions has a Department Manager. The Department Managers are in charge of directing all nursing services within their respective departments.

The Nursing Department also has General Managers who oversee nursing operations during hours when the Nursing Director, Sub-Director, and Department Managers are away. The General Managers are on duty for the 3:00 p.m. to 11:00 p.m. shift and the 11:00 p.m. to 7:00 a.m. shift, Monday through Friday. Damaris Montero is the General Manager for the 3:00 p.m. to 11:00 p.m. shift, and Miriam Pinto Vega is the General Manager for the 11:00 p.m. to 7:00 a.m. shift.

## **2. The Nursing Department's Subdivisions; Their Functions and Staff**

### **a. Medical/Surgical**

Medical/Surgical handles patients who have been admitted to the hospital because of general medical conditions or because they need surgery. The Medical side has 32 beds assigned to it, and the Surgical side similarly has 32 beds.

The Department Manager is Carmen Colon Infante. Colon Infante's shift is from 7:00 a.m. to 6:00 or 7:00 p.m., Monday through Friday.

Medical/Surgical has three Head Nurses: Miriam Diaz, Luz Rodriguez, and Brenda Davila.<sup>6</sup> Diaz covers the Medical side. Diaz' work hours are from 7:00 a.m. to 4:00 p.m. Rodriguez covers the Surgical side during her work hours from 7:00 a.m. to 4:00 p.m. Davila covers the Medical and Surgical sides during her work hours from 3:00 p.m. to 11:00 p.m.

The Medical/Surgical Unit has 19 RNs.<sup>7</sup> The RNs work 12-hour shifts, from 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. The RN day shift usually has five RNs, and the RN night shift usually has three or four RNs. Each RN usually has between 10 and 15 patients, although the number can vary depending on the complexity of each patient's case.

There are 18 LPNs in Medical/Surgical. The LPNs work eight-hour shifts, from 6:00 or 7:00 a.m. to 2:00 or 3:00 p.m., 2:00 or 3:00 p.m. to 10:00 or 11:00 p.m., and 10:00 or 11:00 p.m. to 6:00 or 7:00 a.m. The first shift usually has four to six LPNs, the second shift usually has three or four LPNs, and the third shift usually has three LPNs.

Medical/Surgical has two escorts, who handle transporting patients. The escorts work from 7:00 a.m. to 3:30 p.m.

#### **b. The Emergency Room**

The ER treats patients who present emergency conditions, such as cardiac problems, injuries from a variety of sources including traffic accidents, gunshot wounds, childbirth, respiratory problems, and a host of other conditions. The ER has nine

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<sup>6</sup> The Head Nurses' functions and duties, in all Nursing Department subdivisions that use Head Nurses, are discussed further below.

<sup>7</sup> The functions and duties of the RNs in all the Nursing Department subdivisions are discussed further below.

subareas: triage, the treatment area, Observation 1, Observation 2, Critical 1, Critical 2, Pediatrics, Pediatric Critical Care, and OB/GYN.

The triage area is where RNs do an initial assessment of the patients to decide the time frames for when treatment needs to be delivered. Two RNs work in triage. There is one RN on each of the two daily shifts. An LPN works in the triage area a few times per week.

In the treatment area, the physicians evaluate the patients and write out medical orders. RNs work in this area, but LPNs usually are not assigned here. In the event that there is a large number of patients, the Head Nurse may move an LPN to that location to help out.

Critical Areas 1 and 2 handle patients presenting pressing emergencies, such as victims with wounds from car accidents, knives, or guns, or who are experiencing severe cardiovascular problems. These patients often are brought to the ER via ambulance. There is one RN per shift in each of the two critical areas. Usually there are no LPNs in the critical areas.

Observation Areas 1 and 2 are reserved for patients who need to wait or who need be watched carefully. For example, patients stay in the observation areas when they are waiting for labs or X-rays or are receiving IV fluids. Also, potentially suicidal patients are watched in those areas. Observation Area 1 usually has two RNs per shift. Observation Area 2 is smaller, and there usually is one RN per shift in that area. There usually are one or two LPNs during the 7:00 a.m. to 3:00 p.m. shift, one LPN from 3:00 p.m. to 11:00 p.m., and sometimes one LPN from 11:00 p.m. to 7:00 a.m.

The Pediatrics area is reserved for treatment of children. There is one RN for each 12-hour shift. There usually is one LPN for the 7:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m. LPN shifts. There usually is no LPN for the 11:00 p.m. to 7:00 a.m. LPN shift.

The Pediatric Critical Care area is for treatment of children who present problems such as being unconscious or having convulsions. One RN handles the work in this area.

The OB/GYN area is for female patients who are experiencing problems with pregnancy or labor. Usually, there is not an RN in that care area. An LPN usually is in that area, but if the LPN is not there an RN will cover it.

The Department Manager is Florita Santiago Maldonado. Her shift is from 8:00 a.m. to 5:00 p.m.

There are two Head Nurses. The Head Nurses are Ramon Neco and Sira Cordoba. Neco works from 7:00 a.m. to 3:00 p.m., and Cordoba's hours are from 7:00 a.m. to 3:00 p.m.

The ER has approximately 44 RNs. The RNs work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. or 7:00 p.m. to 7:00 a.m. There usually are approximately 9 or 10 RNs per shift.

The ER has six LPNs. The LPNs' shifts are from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.

There are four ward clerks, with one of them assigned per shift. Their shifts are 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.

There is a central supply for the ER, which is staffed by three supply technicians. Their shifts run from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. Only one supply technician works on each shift.

There is one escort, who works from 7:00 a.m. to 3:00 p.m.

**c. OB/GYN-Pediatrics**

OB/GYN–Pediatrics occupies the third floor of the hospital. The two areas are divided. There are 32 beds for OB/GYN and another 32 beds for Pediatrics. OB/GYN treats female patients who are undergoing labor or who have gynecological problems. Pediatrics treats children ranging in age from approximately one month up to 18 years old. Pediatrics treats a variety of conditions, including high fevers, skins problems, infections, gastrointestinal problems, and respiratory problems.

The Department Manager is Ildelgardis Pagan. Pagan works from 6:00 a.m. to 5:00 p.m.

There are two Head Nurses - Iris Rosario and Gregoria Cruz. Head Nurse Rosario is responsible for OB/GYN and Head Nurse Cruz is responsible for Pediatrics. Rosario and Cruz work the same shift times, from 6:00 a.m. until approximately 3:00 or 4:00 p.m. or sometimes as late as 6:00 p.m.

There are 16 RNs in OB/GYN–Pediatrics. The RN shifts run from 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. During the 6:00 a.m. to 6:00 p.m. shift, there are two RNs per shift in OB/GYN and two RNs per shift in Pediatrics. During the 6:00 p.m. to 6:00 a.m. shift, there are three RNs for both areas, with two of them working in OB/GYN and the remaining RN working in Pediatrics.

There are 13 LPNs. The LPNs' shift are from 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. For the first shift, there are two LPNs in OB/GYN and two LPNs in Pediatrics. For the second shift, there are one or two LPNs in OB/GYN and one LPN in Pediatrics. For the third shift, there is one LPN in OB/GYN and one LPN in Pediatrics.

**d. OR**

The OR cares for patients who are undergoing elective or emergency surgical interventions. The OR handles a wide variety of procedures, including wounds from gunshots or stabbings, Cesarean sections, orthopedic corrections, gall bladder operations, and facelifts and other plastic or cosmetic surgery. There are eight operating rooms in the OR.

The OR Manager is Teresa Melendez. Melendez works from 8:00 a.m. to 4:00 or 4:30 p.m.

There is one OR Supervisor - Gladys Figueroa. Figueroa works from 6:30 a.m. to 4:00 p.m. She handles the credentialing of the OR personnel, orders supplies, and assesses the functioning of the operating rooms. She also distributes personnel to the operating rooms, in conjunction with the Head Nurse, based on the type of surgeries performed and competence of the personnel. For example, the OR Supervisor and Head Nurse will assign an RN who has experience in ophthalmology to surgeries that involve the eye.

The OR has one Head Nurse - Abigail Berrios. Berrios' shift is from 6:30 a.m. to 4:30 p.m.

There are 19 RNs. The RNs' shifts are 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., 11:00 p.m. to 7:00 a.m. There usually are six or seven RNs on the first shift, two RNs on the second shift, and one RN on the third shift.

There are 14 OR technicians. The OR Technicians hand surgical instruments to the surgeons during operations, keep track of the count of materials and instruments used during the procedures, and do the initial cleaning of instruments after the operations. The OR Technicians work on three shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., 11:00 p.m. to 7:00 a.m. There are six OR Technicians for the first shift, one OR Technician for the second shift, and one OR Technician for the third shift.

There are no LPNs in the OR.

There is one escort, who works from 7:00 a.m. to 3:30 p.m.

The OR has one ward clerk, who works Monday through Friday, 7:00 a.m. to 3:00 p.m.

There are five supply technicians who work in central supply.

#### **e. Labor/Delivery**

Labor/Delivery treats women who are in labor or who have a problem with their pregnancies. There are five or six beds in the area, distributed through a pre-labor area and three labor rooms.

The Department Manager is Carmen Sanchez. She works Monday through Friday, from 7:30 a.m. to 4:00 or 5:00 p.m. Sanchez assigns the RNs and LPNs to their shifts.

There are no Head Nurses in Labor/Delivery.

Labor/Delivery has 12 RNs. The RN shifts are from 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m. There usually are three or four RNs on the day shift and two RNs on the night shift.

Six LPNs work in Labor/Delivery. The LPNs take vital signs, help with patient hygiene, and help mothers get to the bathroom. The LPNs shifts are from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. There usually are one or two LPNs on the day shift, one LPN on the evening shift, and one LPN on the night shift.

**f. Newborn/Neonatal Intensive Care Unit**

Newborn/NICU handles the care of newborn infants. The Newborn/NICU is divided into four areas: Well Baby, Neonatal Intensive Care, Intermediate Care, and Isolation. Well Baby takes care of all the babies who are born healthy, with no complications. Neonatal Intensive Care cares for all the babies that need intensive care. Intermediate Care cares for babies who need special attention, but less than the care provided in NICU. Isolation cares for babies who have HIV or addictions.

The Department Manager is Elba La Santa. She works Monday through Friday, from 8:00 a.m. to 5:00 p.m.

Newborn/NICU has one Head Nurse - Judy Santiago. Santiago works Monday through Friday, from 7:00 a.m. to 4:00 p.m.

There are 17 RNs. The RNs work shifts that run from 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m. There usually are three or four RNs on each of the two shifts. Two of the RNs work in NICU on each shift. Well Baby has one RN per shift. Intermediate Care is covered by an RN from NICU. Isolation is covered by an RN from



either Well Baby or NICU. The RNs take blood samples from the babies, take their vital signs, feed them, and evaluate their neurological responses.

Newborn/NICU has four LPNs. The LPNs' shifts run from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. Usually there are three LPNs on the first shift, one LPN on the second shift, and no LPNs on the third shift. The LPNs work only in Well Baby. The LPNs take care of the babies' hygiene, feed them, and take their pictures.

#### **g. ICU**

The ICU provides care for patients with complex conditions who require substantial observation and monitoring. The ICU has 23 beds, divided into two areas – Area A and Area B. Area A has 11 beds, and Area B has 12 beds.

The ICU Manager is Edmee Melendez. Her work schedule is Monday through Friday, 8:00 a.m. to 4:00 or 5:00 p.m. Melendez takes care of administrative tasks, assesses clinical records, and serves on committees.

There are two ICU Supervisors, Eliza Ortiz and Vilma Delgado. Ortiz and Delgado both work Monday through Friday, starting at 7:00 a.m. Ortiz works until 3:30 or 4:00 p.m., and Delgado works until 3:00 p.m. Ortiz works in Area A, and Delgado works in Area B. Both of them work directly with the patients. They interact frequently with the RNs and LPNs. Supervisors Ortiz and Delgado make sure that physicians' medical orders are followed and they make personnel assignments within the ICU.

The ICU does not have any Head Nurses.

There are 27 RNs in the ICU. The RNs work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m. The RNs work directly with the patients. On the

day shift, there are six RNs divided between Area A and Area B. On the night shift, there are five RNs.

The ICU has 13 LPNs. The LPN shifts are from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. On the day and evening shifts, there are four LPNs. On the night shift, there are two LPNs. The LPNs take care of patient hygiene, taking vital signs, feeding patients, and changing patients' positions.

The ICU has one escort – Rafael Serrano.

#### **h. Personnel Development**

The Nursing Department has a Personnel Development program. That program is involved in training and educational activity for staff and patients. Personnel Development has three staff members, as described below.

The head of Personnel Development is Haydee Brito Ortiz, who is the Coordinator of Personnel Development. Brito Ortiz reports to Nursing Director Burgos. Ortiz works Monday through Friday, from 7:00 a.m. to 4:00 p.m. She is in charge of evaluating and coordinating the educational programs for hospital personnel (including continuing nursing education) and the results of the hospital's quality control efforts. She handles orientation of new RNs and other staff. Brito Ortiz attends monthly meetings with managers, supervisors, and Head Nurses.

Personnel Development has an Instructor of Personnel Development, which position is held by RN Jovita Ortiz Rivas. Ortiz Rivas reports to the Coordinator of Personnel Development. She is involved in new employee orientation and quality improvement. She serves as a resource for educational activities involving staff. Ortiz Rivas does not offer direct patient care. She fills in as Coordinator of Personnel

Development when Brito Ortiz is on vacation, and she serves as a General Manager on some weekends. Ortiz Rivas attends monthly meetings with managers, supervisors, and Head Nurses.

There also is an Instructor for Patient Education – Luz Diaz Rosado - who reports to the Coordinator of Personnel Development. She is involved in informing patients and their families about the patients' health conditions. Diaz Rosado is not involved in direct patient care, although she meets directly with patients and their families to educate them about health conditions. Unlike the Instructor of Personnel Development, Diaz Rosado ordinarily does not handle education of nurses. She serves as a General Manager on some weekends. The record evidence concerning how often she serves as General Manager is limited to a single Employer exhibit, which shows that, from early January to late March 2009, she served as General Manager on two weekend days. Diaz Rosado attends the monthly meetings with managers, supervisors, and Head Nurses.

### **3. The Head Nurses' Functions**

As described above, the Head Nurses work in Medical/Surgical, ER, OB/GYN–Pediatrics, OR, and Newborn/NICU. Medical/Surgical has three Head Nurses, the ER and OB/GYN–Pediatrics each have two Head Nurses, and the OR and Newborn/NICU each have one Head Nurse. The Head Nurses' general role is to evaluate the quality of service provided to patients, oversee the nursing personnel, and coordinate services. They are involved in organizing the work activities of the staff, coordinating reports between outgoing and incoming personnel, making rounds, and ensuring that all nursing staff are performing their duties and providing good care.

In Medical/Surgical, the Department Manager and the three Head Nurses (Miriam Diaz, Luz Rodriguez, and Brenda Davila) are responsible for filling out daily assignment sheets for the RNs and LPNs. In filling out those sheets, the Department Manager/Head Nurses decide which RNs and LPNs will work on the Medical side and which RNs and LPNs will work on the Surgical side. The Department Manager/Head Nurses also designate the particular patients for each RN, taking patient categorization into account. The RNs categorize patients into one of three categories – Category 1, Category 2, or Category 3 – based on an assessment of their health conditions (including factors such as breathing ability, skin integrity, mobility, feeding, and therapy). Category 1 patients require the most care, and Category 3 patients require the least care. In matching RNs with patients, the Department Manager/Head Nurses consider the nature of the patients' conditions and the expertise of the available staff. Additionally, the Department Manager or the Head Nurse designate which RNs will be responsible for particular tasks - such as checking the crash cart, the defibrillator, and narcotics – and which LPNs will be responsible for other tasks – such as calibrating various machines and monitoring medication refrigerator temperatures. The Department Manager/Head Nurses also designate a group leader to handle issues such as admissions and family complaints during times when the Department Manager and Head Nurse are not available.

In the ER, the Head Nurses (Ramon Neco and Sira Cordoba) designate the specific work locations for the RNs and LPNs.<sup>8</sup> They designate these work locations on a daily shift-by-shift basis, and sometimes during shifts depending on the number of

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<sup>8</sup> Department Manager Maldonado takes care of designating work locations approximately twice per week.

patients in the various areas of the ER. The Head Nurses base their RN placement decisions on the RNs' competence and experience. Thus, for example, the Head Nurses designate the RNs who have more experience and competence in cardiology to the ER critical area, and they will designate RNs with more experience in pediatrics to the pediatric area.

In OB/GYN–Pediatrics, on a daily basis, the Head Nurses (Iris Rosario and Gregoria Cruz) designate which RNs and LPNs are responsible for particular patients. The Head Nurses base those designations on their assessment of the patients' needs and staff skills and competence. The Head Nurses also designate which RNs will be responsible for the crash cart, narcotics count, admissions, and meal times, and which LPNs will be responsible for admissions, discharges, calibration of machines, and similar tasks. Additionally, the Department Manager and the Head Nurses work together to establish the work schedules for the RNs and LPNs.

In the OR, Head Nurse Abigail Berrios distributes personnel to the operating rooms, in conjunction with the OR Supervisor, based on the type of surgeries performed and competence of the personnel. The Head Nurse also communicates with the surgeons to coordinate the operating rooms, and she designates the particular operating rooms for particular surgeries. Additionally, she keeps track of all the activities during surgeries, and keeps logs reflecting those activities.

In Newborn/NICU, Head Nurse Judy Santiago designates the RNs who will cover the various areas within Newborn/NICU. Additionally, she takes care of covering for absences and oversees the clinical aspects of the work, including checking patient care documentation and evaluating the quality of the care.

All the Head Nurses are involved in providing job counseling to staff, writing reports to management about problems encountered with staff, and writing corrective warnings and reprimands. The record includes several examples of such activity, including the following. On May 15, 2007, OB/GYN-Pediatrics Head Nurse Crucita Reyes Munoz wrote a report to Department Manager Ildelgardis Pagan concerning misbehavior by an LPN, asking the Department Manager to take action. On June 20, 2008, ER Head Nurse Ramon Neco wrote a report concerning an RN's inadequate reporting on patient records. On June 25, 2008, Medical/Surgical Head Nurse Miriam Diaz wrote a formal reprimand to an RN for not checking the crash cart. On October 2, 2008, OR Head Nurse Abigail Berrios wrote a first step oral reprimand to an RN for not delivering lab tests. On or about December 29, 2008, Medical/Surgical Head Nurse Diaz wrote a report about several performance deficiencies by an RN. On or about December 31, 2008, Medical/Surgical Head Nurse Diaz wrote out a first step oral reprimand to an RN for being absent. On or about January 12, 2009, OR Head Nurse Berrios wrote a first step oral reprimand to an OR Technician regarding problems with his meal period. Director of Nursing Burgos received copies of those documents, for inclusion in the personnel files.

The Head Nurses are involved in preparing staff evaluations. They sign off on the evaluations that they prepare, along with the Department Manager.

The Head Nurses attend monthly meetings with the Nursing Director and other managers, and they serve as General Managers on weekends.

#### **4. The RNs' Functions**

The RNs in all Nursing Department subdivisions frequently work on their own, caring directly for patients and providing hands-on patient care. The RNs in Medical/Surgical are personally responsible for various tasks, such as administering medications, inserting IVs, and taking lab samples. The ER RNs handle initial assessment of the patients, execute physicians' medical orders, administer medications, take lab samples, transfuse blood, handle chest tubes and catheters, insert sutures, give IV fluids, and coordinate with other professionals. The RNs in OB/GYN-Pediatrics carry out medical orders, take lab samples, care for surgical incisions, and give instructions on breast feeding. The Pediatrics RNs carry out medical orders, take lab samples, and handle "canalization" of veins. The OR RNs assist during surgeries by keeping track of documentation of the clinical record, making sure that personnel have used proper hand-washing procedures, and monitoring to make sure that no contamination has taken place in the operating environment. The Labor/Delivery RNs take care of the mothers and babies and assist the physicians throughout the delivery process. The RNs in Newborn/NICU take blood samples from the babies, take their vital signs, feed them, and evaluate their neurological responses. The ICU RNs also work directly with the patients, handling matters such as coordinating the change-of-shifts reports, accounting for narcotics, taking medical orders, administering medications, and drawing blood.

The RNs all work in conjunction with other staff members, including LPNs. The record discloses that all the RNs have the authority to, and are expected to, direct LPNs and other staff to perform discrete patient care tasks. Thus, the RNs may tell the LPNs

to take vitals, empty Foley catheters, change patients' positions, bathe or clean patients, bring snacks to the patients, watch patients, or transport patients to other areas.

Because the RNs are primarily responsible for the care of the patients, the RNs also are expected to make sure that the LPNs and other staff have taken care of their duties. The RNs oversee the care process, and they may talk to LPNs and other staff to correct them if they have not adequately performed their duties.

In the event that an RN's discussions with other staff members about performance deficiencies do not remedy the problem, the RNs is expected to notify the Director of Nursing and/or Human Resources by submitting written reports. For example, in March 2007, RN Iris Rosario directed a written complaint to Nursing Director Burgos Rodriguez about an LPN ignoring Rosario's direction to care for several patients. RN Rosario asked Nursing Director Burgos Rodriguez to meet with her and the LPN. After the Nursing Director received the complaint, she met with RN Rosario, the LPN, and the LPN's manager. The Nursing Director instructed the LPN to respect the RN's instructions. The Nursing Director testified that she has not received any other write-ups from any RN.

The Department Managers are responsible for completing performance evaluations of staff members who are subordinate to the RNs. Because the RNs work closely with other staff members, the RNs give input to higher management in connection with higher management's evaluations of the non-RN staff.

While the RNs have the authority to take actions to make sure that staff are doing their jobs adequately, RNs do not have direct authority to take more serious action. The Director of Nursing, the Department Managers, and Human Resources retain the



authority to impose any discipline beyond the RNs' role in verbally discussing problems with staff. RNs may recommend to higher management that they impose discipline on staff who have committed infractions, although the record does not include any specific evidence of actual recommendations of discipline. Nursing Director Burgos Rodriguez testified that she was not able to provide any specific example of an RN recommending disciplinary action.

The Department Managers evaluate the RNs in part on how well they oversee other staff members' performance. At the hearing, the Employer introduced into evidence several blank evaluation forms for Nursing Department RNs. The evaluation forms rate the RNs on dozens of elements, including elements on providing direction and guidance. The rating scale on each element goes from four to one, where four equals "consistently exceeds standards," three equals "consistently complies with the standard," two equals "needs improvement," and one equals "does not comply with the standard." The raters calculate an overall tally based on each of the many individual rating elements, yielding a rating of "excellent," "good," "limited," or "poor." The evaluation forms reflect that, in the event that an RN has performance problems, the Employer may consider a corrective action plan. The forms also reflect that the rater checks off whether the employee can or cannot continue employment.

In addition to the blank evaluation forms, the Employer introduced seven completed annual evaluations of non-probationary RNs in the Nursing Department. Two of the evaluations were for RNs in OB/GYN–Pediatrics; two were for RNs in Labor/Delivery; two were for RNs in the ICU; and one was for an RN in the OR. Those

evaluations show that those RNs performed at an acceptable level and that they were able to continue their employment.

The RNs play a very limited role in hiring. Director Burgos Rodriguez and Sub-Director Aponte Rosado handle hiring throughout the Nursing Department. The Human Resources Department receives resumes and forwards them to the Director when positions are available. Director Burgos Rodriguez usually conducts the interviews, but when she is not available Sub-Director Aponte Rosado conducts interviews. For hiring in the OR, the OR Department Manager participates in the interviews. RNs do not have any formal involvement in the interview or hiring process, although some RNs have made recommendations. In the year before the hearing, approximately four RNs made hiring recommendations. The Director takes those RN recommendations into consideration in making her selections. Once Burgos Rodriguez makes the selection decision, Human Resources takes care of notifying the applicants and processing the employee paperwork.

When the Director of Nursing is assessing whether new hires have performed adequately during their probationary periods, she asks the Department Managers and the RNs about the new hires' performance. She asks the RNs for their views because they work directly with the new hires and are in a position to know if they have performed adequately.

The RNs and LPNs direct their requests for vacation or sick leave to their Department Managers, Supervisors, or Head Nurses, who can authorize the leave. In the event of lateness or absence, the RN or LPN are to notify the same personnel. In the OR, the OR Technicians are supposed to report absences due to sickness by

calling anyone from the administrative team or a General Supervisor. If the employee cannot reach one of those persons, he may contact the RN. RN then notifies higher authority about the absence.

When Labor/Delivery Manager Sanchez is away or on weekends, an RN coordinates with the RNs and LPNs who are on shift to make arrangements to cover absences. The RN notifies the General Supervisor about the no-show and provides information about the arrangements for covering. In the event a staff member needs to leave work, the RN has the authority to allow it, but the RN must inform the General Supervisor.

The RNs do not attend the meetings that the Director of Nursing conducts monthly.

Each of the various subdivisions within the Nursing Department interacts with staff from other hospital departments, such as Respiratory Therapy, Nutrition, Social Work, Cleaning, Laundry, Maintenance, Pharmacy, Lab, and Chaplain Services. The RNs may deal with staff in those departments, as part of their obligation to ensure that patients are receiving good care. If personnel in those departments do not provide adequate service, the RNs may complain to higher authorities.

#### **A. Casa de Salud**

Casa de Salud is a 20-room, in-patient skilled nursing facility that provides rehabilitation services such as nursing care, physical therapy, occupational therapy, and speech therapy. A large percentage of Casa de Salud's patients undergo therapy as part of recovery from knee or hip surgery or from mini-strokes. The typical patient census is approximately 30. Casa de Salud has two contracted physicians who serve

as consultants and who are present at the facility regularly during the day, on a flexible time schedule.

The Director of Casa de Salud is Judy Aponte Rosado. Aponte Rosado works Monday through Friday, from 8:00 a.m. to 5:00 p.m., and she can be reached during nonscheduled hours if there is a need. The Director handles the hiring for Casa de Salud, with assistance in interviews from the Manager and Head Nurse.

In addition to Director Aponte Rosado, there is one Manager, Merith Reyes. Reyes works Monday through Friday, from 6:00 a.m. to 3:00 p.m. Among other things, Manager Reyes classifies patients based on their conditions to determine the level of care that they need. As part of that evaluation, Reyes considers the patients' activity level, hygiene, feeding, medication, and other factors. Reyes assigns points to the various factors, and the total points determine the level of care that the patients need. Reyes also determines whether new hires have passed the probationary period, in conjunction with the Head Nurse.

Casa de Salud has one RN Head Nurse, Brenda Martinez. Her shift is from 6:00 a.m. to 3:00 p.m. Martinez attends monthly meetings with Director Aponte Rosado.

As Head Nurse, Martinez takes care of matching the RNs and LPNs on a shift with individual patients, on a daily basis. To do that matching, Martinez uses the patient classifications that Manager Reyes completes every Monday. Martinez also designates which RNs will handle particular tasks (such as checking the crash cart, doing the narcotics count, checking a dextrose stick machine, and organizing the blood sample tray), and which LPNs will handle other tasks (such as cleaning thermometers, weighing patients, and washing patients' hair). Martinez rotates the responsibility for

performance of such particular tasks among the RNs and LPNs so that no one has to do the same task all the time.

In addition to the above-described functions, Head Nurse Martinez also evaluates patients, makes rounds, ensures that the RNs are performing their duties, and checks to see that there is compliance with the patient treatment plan. As part of her rounds, the Head Nurse usually does not provide hands-on care to patients, and she generally limits her activities to making sure that the RNs and LPNs are performing their direct patient care responsibilities.

Martinez also works with Manager Reyes to create monthly work schedules. Generally, Manager Reyes schedules the RNs and Head Nurse Martinez schedules the LPNs, although they work together to ensure coverage. When one of them is not available to handle scheduling, the other does all the monthly scheduling for the RNs and LPNs.

Martinez also assists Manager Reyes with annual evaluations, by providing Reyes with information about staff members' performance.

Casa de Salud has 12 RNs. The RNs' shifts are from 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. Usually, there are three RNs on the day shift and two or three RNs on the night shift.

The RNs are responsible for executing physicians' orders and communicating with the physicians about the patients' conditions. They make rounds to check on patients, administer medications, monitor the crash cart, and keep track of narcotics. The RNs work with the LPNs on direct patient care tasks. Usually, each RN works directly with two LPNs per shift, as a team.

As part of the RNs' interaction with the LPNs, the RNs make sure that the LPNs perform their duties. The RNs' evaluation form includes a rating element regarding how well they "[m]ake[] sure practical personnel comply with assigned tasks." The rating is on a scale of one to four, and that element is one of approximately 50 rating elements. As with the Nursing Department RNs, the evaluation includes an area for the rater to indicate if the RN can continue in employment. There is no evidence showing that any Casa de Salud RN has lost employment due to the result of an evaluation. Director Aponte Rosado testified that, in the event that an LPN fails in a duty, the RN "could" receive discipline, after an investigation that may involve Human Resources. Aponte Rosado also testified, however, that she is not aware of a situation in which an RN ever received discipline in such circumstances, as no LPN ever failed to perform a duty.

If an RN is not successful in obtaining adequate performance by talking to an LPN, the RN can document the shortcoming by writing a report to the Head Nurse. The Head Nurse can notify the Manager, who then informs Director Aponte Rosado. Director Aponte Rosado testified that RNs have the authority to "discipline" LPNs, but it is not clear what such discipline entails and whether it involves anything more than writing a report to higher authorities.

The RNs provide information about the LPNs to Manager Reyes and Head Nurse Martinez in conjunction with Reyes' annual evaluations.

There are 15 LPNs. The LPNs' shifts are 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. There usually are five to seven LPNs on the 6:00 a.m. to 2:00 p.m. shift, three or four LPNs on the 2:00 p.m. to 10:00 p.m. shift, and one LPN on the 10:00 p.m. to 6:00 a.m. shift. The LPNs handle tasks such as taking

patients' vital signs, bathing patients, changing patients' positions, changing bed linens, feeding and hydration, taking care of sores, taking patients to the bathroom, taking urine samples, walking with patients, and carrying out RN instructions. An RN may direct an LPN to handle tasks such as getting a culture, applying a suppository, performing an enema, or taking a patient to a visit with a physician.

Casa de Salud also has other staff, including one occupational therapist, two occupational therapy assistants, one recreational leader, one escort, two ward clerks, and three cleaners. The RNs interact with those staff members. For example, the RNs obtain information from the occupational therapist and the occupational therapy assistants about any significant changes in the patients' conditions. The RNs assist the recreational leader by helping bring patients to recreational events, such as bingo games, films, musical presentations, and holiday and religious celebrations. The RNs coordinate with the ward clerks so that patient medical records are up to date. The RNs may have the escort obtain items from central supply, the pharmacy, or the warehouse. Additionally, the RNs may have the escort deliver samples to the lab, or take particular patients to the X-ray department or other locations. The RNs tell the cleaners when a room needs to be cleaned.

In addition to the staff identified above, Casa de Salud has several support personnel who provide services but do not report to the Director – one nutritionist, one social worker, one physical therapist, four physical therapy assistants, one pharmacy employee, and a respiratory therapy technician. The RNs communicate with these personnel about subjects such as times to meet with patients and changes in patients' conditions.

Casa de Salud has an Minimum Data Set (MDS) Coordinator. The current MDS Coordinator is Gelmarie Berrios. The MDS Coordinator must be an RN, because she is involved in evaluating patients. The MDS Coordinator is not involved in direct patient care, but is responsible for gathering information about patients. Every Monday, Wednesday, and Friday, the MDS Coordinator meets with an interdisciplinary team that includes representatives from physical therapy, occupational therapy, social work, nutrition, and pharmaceuticals. The physician, speech pathology, and the patient also may participate, if necessary. The MDS Coordinator obtains patient information from the team members and enters that information on a form, to create patient profiles. The MDS Coordinator sends that information to a government agency so that the hospital can be reimbursed for its services. The MDS Coordinator reports to Director Aponte Rosado, and is involved in monthly meetings with the Director. The parties stipulated that the MDS Coordinator shall be excluded from the petitioned-for unit on the grounds that the position is managerial and/or supervisory.

The Quality Improvement Coordinator is Sandra Morales. The Quality Improvement Coordinator must be an RN. The Quality Improvement Coordinator is involved in evaluating physician, RN, and LPN compliance with nursing rules and procedures governing subjects such as administration of medication, proper hygiene, patient skin care, and record keeping. In the event that the Quality Improvement Coordinator identifies deficiencies, she provides training and orientation to correct the problems, in conjunction with the Head Nurse. The Quality Improvement Coordinator is involved in monthly meetings with the Director. The parties stipulated that the Quality



Improvement Coordinator shall be excluded from the petitioned-for unit on the grounds that the position is managerial and/or supervisory.

## **B. Home Health Services**

Home Health Services operates a home-based health care program and a hospice program. Home Health Services is housed at the hospital, but its staff members visit patients' home to deliver care. The Director of Home Health Services is Aurora Vazquez Antuna.

### **1. Home Health Care**

Home Health Care provides services such as nursing care and physical therapy in patients' homes for patients undergoing rehabilitation (for example, after having suffered a stroke). The patient census usually is approximately 275 patients, although the number varies.

Home Health Care has one Manager (Isaura Ortiz Garcia) and two Nursing Supervisors (Nellyset Guzman and Raquel Melendez). Manager Garcia and Nursing Supervisors Guzman and Melendez all work Monday through Friday, from 8:00 a.m. to 5:00 p.m. The Nursing Supervisors oversee the nursing personnel and take care of assigning tasks and completing evaluations.

There are 12 RNs, 1 Health Assistant, two physical therapists, 12 physical therapy assistants, and 1 social worker.

The RNs assess the patients' health conditions, develop home care plans, and provide treatment. They work Monday through Friday, from 7:30 a.m. to 4:00 p.m.

In conjunction with their development of care plans, the RNs provide the Health Assistant with information about the patients' health conditions, and let the Health

Assistant know the tasks that need to be performed to assist the patients. For example, the RNs provide the Health Assistant with information about how to perform bathing, hair washing, oral hygiene, foot care, and skin care. The Health Assistant assists the patients with bathing and bedding, as called for in the care plan.

The RN and the Health Assistant often are not at the patients' homes at the same time. In the course of the RN's home visits, the RN obtains information from the patients and the patients' families about the Health Assistant's job performance. Every 15 days, the RN fills out a form, assessing the Health Assistant's performance on a variety of job elements, such as organizing work, using aseptic techniques and universal precautions, personal care, safety techniques, and communication. The completed forms are kept in the patients' clinical files.

In the event of a performance problem with the Health Assistant, the RNs can talk to the Health Assistant to correct the problem. Alternatively, the RNs can bring the matter to the Nursing Supervisors' attention. The Nursing Supervisors can bring the issue to the Manager, who may involve Human Resources.

The Nursing Supervisors conduct annual evaluations of the RNs. The RNs are evaluated on how well they "supervise" the Healthcare Assistant. There is no indication that the Employer uses the evaluations to determine any benefits or adverse consequences for the RNs.

The Nursing Supervisors also conduct an annual evaluation of the Health Assistant, with input from the RNs. The RNs provide the Nursing Supervisors with information about the Health Assistant's job performance, such as the nature of the Health Assistant's relationships with the patients and families, whether any complaints

have been made about the Health Assistant, and whether the Health Assistant failed to complete tasks. Additionally, the Nursing Supervisors consider information included in the evaluations that the RNs conduct every 15 days.

The Manager and the Nursing Supervisors handle issues about absences or lateness.

While the RNs are at the patients' homes, they interact with the physical therapy assistants who carry out the treatment that the physical therapists prescribe. The RNs and the physical therapy assistants communicate with each other about the patients' conditions.

The RNs also communicate and coordinate with the social worker about various situations that could affect the well being of the patients.

## **2. Hospice**

In the hospice program, Home Health Services cares for terminal patients with a life expectancy of six months or less. The usual number of patients receiving hospice care is approximately 17 to 21, but the number can vary significantly. A therapeutic group – including a Medical Coordinator, physicians, nurses, social workers, chaplains, housekeepers, nutritionists, and volunteers – puts together a care plan for the patients. The therapeutic group determines the level of patients' needs and what services will be provided.

The Medical Coordinator for the therapeutic group is Jose Luis Sepulveda Castro, who is an RN. He is responsible for oversight of the staff members who provide the services. The Medical Coordinator works Monday through Friday, from 7:00 a.m. to

4:00 p.m., and he is available at any time should a need arise for his involvement. The Medical Coordinator takes care of evaluations, vacations, and staff absence or lateness.

The hospice program has three RNs (Alba Delgado, Luis Melendez, and Tomasita Rodriguez), one Health Assistant, and five Housekeepers. The three RNs assess patients' needs, develop care plans consistent with the decisions of the therapeutic group, and provide treatment in the patients' homes. The Health Assistant helps patients with their personal hygiene needs, such as bathing. The Housekeepers prepare patients' meals and assist patients with tasks around their homes, such as cleaning and organizing. In conjunction with their development of care plans, the RNs provide the Health Assistant and the Housekeepers with information about the patients' health conditions, and let them know the tasks that need to be performed to assist the patients. For example, the RNs provide the Health Assistant with information about how to perform bathing, hair washing, oral hygiene, foot care, and skin care.

During the RNs' visits to patients' homes, the RNs verify that the Health Assistant and the Housekeepers are providing the services called for in the therapeutic group's care plan. Every 15 days, the RNs fill out a form to assess the Health Assistant's and Housekeepers' performance in several specified categories. The evaluation for the Health Assistant includes rating elements on planning and organizing work, orienting the family, and applying appropriate techniques. The evaluation for the Housekeepers includes rating elements on planning and organizing work, obtaining food, preparing food, and cleaning. Those evaluations are placed in the patients' clinical files.

The Medical Coordinator and the Director conduct annual evaluations of the RNs. The Medical Coordinator's annual evaluations of the RNs include a few ratings

elements - out of almost 100 ratings elements - relating to the RNs' oversight of the Healthcare Assistant and the Housekeepers. The elements are scored from four to one, which four being the best score and one being the worst. There is no evidence to show that the evaluations result have any tangible effect on the RNs' terms and conditions of employment.

The Medical Coordinator also conducts annual evaluations of the Health Assistant and the Housekeepers. In conducting performance evaluations, he considers the reports that the RNs complete every 15 days. He also takes into account his own observations from his occasional visits to patients' homes.

If an RN has a problem with the Health Assistant's performance or a Housekeeper's performance, the RN reports to the Medical Coordinator, and the Medical Coordinator then follows up. Any discipline is handled by department management, with involvement by Human Resources.

### **C. External Clinics**

External Clinics provides follow-up health services and monitoring to outpatients. The Manager for External Clinics is RN Nilsa Rosas Serrano. Serrano is responsible for the overall operations, and she handles staffing issues if employees, including LPNs, call in late or absent. External Clinics includes the Hematology/Oncology Clinic and the Gastroenterology Clinic. Those two clinics have three RNs. Of the three, two RNs work in the Hematology/Oncology Clinic and one RN works in the Gastroenterology Clinic.

The two RNs who work in the Hematology/Oncology Clinic are Carmen Lozada and Julia Marvaez. Lozada works from 7:00 a.m. to 3:00 p.m. and Marvaez works from 7:30 a.m. to 3:30 p.m. Lozada and Marvaez divide the nursing work between them,

although Lozada has somewhat greater authority than Marvaez does. For example, Lozada helps Manager Rosas Serrano with annual evaluations, brings potential disciplinary situations to Rosas Serrano's attention, and communicates with Rosas Serrano about administrative changes, holiday requests, and requests for materials and equipment. Lozada also involves herself in collection and invoicing matters. In the event that RN Lozada is away, RN Marvaez substitutes for her. RN Marvaez works with one LPN, Carmen Beltran. LPN Beltran perform tasks such as taking vital signs, weighing patients, interviewing patients, and assisting physicians. RN Marvaez and LPN Beltran work together as a team, under Lozada's direction. Marvaez tells Beltran which patients she will see the next day.

The RN who works in the Gastroenterology Clinic is Carmen Andino. Andino works Monday through Friday, from 7:00 a.m. to 3:00 p.m. She works with one LPN, Milagros Cruz. Occasionally, if needed, a second LPN can be sent from another area to work in the Gastroenterology Clinic. RN Andino interacts with LPN Cruz regarding their daily work, and Andino may direct Cruz to work on particular patients. The two of them work together as a team. RN Andino handles tasks such as inserting IVs, administering sedatives, monitoring patients, checking the crash cart, and dealing with administrative matters. RN Andino tells LPN Cruz which patients to treat first. Cruz handles providing the patients with proper clothing, taking vital signs, making sure that patients have fasted, and checking to see that patient paperwork is complete. If RN Andino encounters performance problems with LPN Cruz, Andino lets Manager Rosas Serrano know about it so that Rosas Serrano can evaluate the situation.

#### **D. The CIS Project**

The CIS Project is a federally-funded program for patients with AIDS. It provides services for patients who have been diagnosed with HIV, patients' relatives, and community members who need assistance with HIV/AIDS issues. A multi-disciplinary team provides a variety of services, including the provision of medical services, lab services, dental services, and counseling services. The team includes physicians, nursing personnel, a dentist, a dental assistant, clinical case handlers, an adherence counselor, clinical psychologists, a nutritionist, a social worker, a health educator, community specialists, pharmacy employees, and a mental health counselor. The program is open Monday through Friday from 6:00 a.m. to 5:00 p.m. and some Saturdays from 7:00 a.m. to 11:00 a.m. Approximately 15 to 20 HIV-positive individuals seek services each day, and others show up for diagnostic tests to determine if they are HIV-positive.

The Director of the CIS Project is Felicita de Jesus. Among other things, the Director is responsible for preparing proposals, budgeting, and designing and providing training to the clinical personnel. She usually is at the office from 1:00 p.m. to 7:00 p.m., although her hours vary.

Mayra Lopez serves as Assistant to the Director. She is in charge of administrative matters, including the budget.

There is a Clinical Supervisor, whose name is Jasmine Ortiz. Ortiz is an RN, but she does not work directly in patient care. Her duties involve working with the Director in establishing treatment guidelines, monitoring quality standards, and overseeing all the clinical personnel in the program including the RNs and LPNs. There are two RNs

and three LPNs. The RNs are Sandra Gonzales and Luz Hernandez. Ortiz works Monday through Friday from 6:00 a.m. to 2:00 p.m.

One of the two RNs, Sandra Gonzales, serves as Head Nurse. Gonzales functions as a coordinator. Each day, she identifies the patients who are scheduled to come in the following day for services. She allocates patients to the various clinical professionals. Gonzales opens the clinic in the morning and organizes the working area to make sure that there are adequate materials and equipment. When patients arrive, she interviews them during the admissions process and determines treatments. At that point, Gonzales, the other RN, and the LPNs begin providing care. Gonzales may have the others perform particular tasks, such as having the other RN draw blood or telling the LPNs to take vital signs. Two of the three LPNs regularly work directly with Gonzales, taking vital signs and assisting her as needed. Throughout each day, Gonzales oversees the process of providing services to patients, to make sure that the members of the multi-disciplinary team see patients in a timely manner. If one member of the team is too busy to see a particular patient, Gonzales moves the patient to another team member who is available. When necessary, Gonzales delegates various tasks to the LPNs, such as assisting the physician or coordinating lab or medical appointments. She also makes sure that staff members fill out required reports and statistics. Gonzales participates in staff evaluations, along with the Clinical Supervisor. She also helps with putting together job descriptions, establishes vacation schedules for the nursing staff (subject to the Director's approval), gives recommendations regarding discipline, and tells the nursing staff when they can leave for lunch. Head Nurse



Gonzales works Monday through Friday, from 6:00 a.m. to 2:00 p.m. Clinical Supervisor Ortiz evaluates Gonzales.

The other RN is Luz Hernandez. Hernandez works Monday through Friday, from 7:00 a.m. to 3:00 p.m. and sometimes on Saturdays. She works with the patients at the time of their discharge, after they have seen the various members of the multi-disciplinary team. She helps the physician in the performance of clinical procedures. She works with the LPNs, provides guidance to the patients regarding their medications, coordinates with patients about their appointments, and logs information into a statistical database. Clinical Supervisor Ortiz evaluates Hernandez' performance, with input from Head Nurse Gonzales and the physicians. Hernandez' evaluation includes a rating for coordinating and monitoring work assignments for LPNs.

The three LPNs' basic duty is to assist the RNs. The RNs tell them to perform various tasks, and the LPNs are expected to take care of completing them. The RNs have the LPNs handle tasks such as taking vital signs, conducting patient interviews, assisting physicians, and recording clinical statistical information. The LPNs work Monday through Friday from 7:00 a.m. to 3:00 and occasionally on Saturdays. Clinical Supervisor Ortiz and Head Nurse Gonzales prepare the evaluations for the LPNs.

RN Hernandez and the LPNs are supposed to notify Head Nurse Gonzales in the event that they will be late or absent. If Gonzales is not available, Hernandez is supposed to notify Clinical Supervisor Ortiz and the LPNs are supposed to notify RN Hernandez.

## **E. Preventive Medicine**

The Employer has a Preventive Medicine program, which is involved in various efforts to prevent illnesses, through in-office services and through community health fairs. The in-office services include vaccinations, testing for tuberculosis and related certifications, and testing for sexually-transmitted diseases. The community health fairs – which take place approximately twice per month – offer educational programs on health topics, vaccinations, and blood pressure tests. The Director is Lydia Abreu Santana. The program has two physicians, two RNs, one LPN, one health educator, one CPR instructor, and a nutritionist.

The two RNs are Wallesca Velazquez Correa and Maria Rodriguez Salinas. Their work hours are Monday through Friday from 7:00 a.m. to 3:30 p.m. They are involved in conducting tuberculosis tests, taking blood and other samples, vaccinations, and coordination of community education. At the health fairs, the RNs make educational presentations about health issues, such as breast and prostate health. The RNs draft a weekly task assignment sheet for review and signature by Director Abreu Santana, showing the main daily assignments for the various staff members.

There is one LPN - Mayra Cruz. LPN Cruz assists the clinic physicians, by taking patient vital signs, gathering patient records, and coordinating appointments. A few times per week, an RN observes whether the LPN is following procedures with regard to documenting vital signs and various other matters that are not detailed in the record. When the LPN attends health fairs, she checks individuals' vital signs. If she see patients with abnormal vital signs, she refers those patients to an RN. If LPN Cruz

is going to be late or absent, she is supposed to call the office to inform the RN. The RN passes that information to Director Abreu Santana.

#### **F. Preadmissions**

The hospital has a Preadmissions area that handles administration of medical orders for patients who are to be admitted.

The regular Supervisor of Preadmissions has been Carmen Torruellas.

There is a Preadmissions RN, who is in charge of documenting and preparing patients' medical records. The Preadmissions RN is Ruth Figueroa. She implements the medical care plan for patients prior to their admission. She performs medical assessments of patients, creates medical charts, orients admitting physicians and family members about procedures and policies, coordinates the admission process, and verifies that patients have complied with the requirements for admission. Additionally, she checks to see that an LPN – Ana Pacheco – has completed her tasks of taking patients' vital signs and samples. Figueroa's evaluation includes a rating element on how well she "[e]valuates the work done by the licensed practical nurse." The record does not show that Figueroa's evaluation leads to any result other than continued employment.

There are seven clerks, who handle invoicing and document management.

Figueroa has substituted for Supervisor Torruellas when Torruellas has been on vacation or other leave, although the record does not reveal how frequently such substitution has occurred.

In approximately February 2009, Supervisor Torruellas went on leave, apparently for a medical reason. From that time until at least the close of the hearing on March 9,

2009, Torruellas did not serve as the Supervisor. As of March 9, 2009 – when the hearing closed - Figueroa was in charge of the department. For approximately the few weeks before the March 9 close of the hearing, Figueroa had filled in for Supervisor Torruellas, handling attendance matters and the coordination of work.

#### **G. The Nursing School**

The hospital operates a post–high school vocational school, leading to an LPN degree. RN Elida Moreno is the Director. The school has approximately 21 students each academic year. Students graduate from the nursing school within 52 weeks of beginning the program. The nursing school's faculty includes RNs. There is one full-time professor (RN Nora Rosas Serrano) and one part-time professor (RN Hector Quinones Ramos).<sup>9</sup> The RN faculty are involved in student instruction, by teaching in classrooms, at a skills lab, and in clinical work with actual patients. The RN faculty teach courses covering anatomy, microbiology, pediatrics, maternity, geriatrics, surgical medicine, community health, and mental health. The student's course of studies begins with approximately four months of classroom instruction and work in the skills lab. The last eight months of the program are split between clinical work in the hospital (where the students work in the several departments performing LPN tasks on actual patients) and classroom instruction. The LPN tasks that the students perform on patients include taking vital signs, helping with hygiene and feeding, walking patients, and taking care of patients' skin problems. The school's RN faculty coordinate with hospital personnel to define the work that the students will perform as part of their hands-on clinical work. The

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<sup>9</sup> There also are non-RN personnel who teach courses, including a nutrition course taught by someone with a degree in that area, a Christianity course taught by a chaplain, and a family relationships course taught by a social worker. Other hospital personnel offer educational talks to the students on subjects such as respiratory therapy, infection control, risk management, and negligence and abuse.

RN faculty oversee the students as they work on actual hospital patients. The RN faculty themselves do not work on the patients.

#### **H. Cardiovascular Lab**

The Cardiovascular Lab has two RNs, Mayra Lugo Santiago and Jorge Lebron Reyes. The Employer does not contend that they are supervisors, as they do not exercise any authority over any subordinate employees. The parties stipulated that there is no reason to exclude them from the petitioned-for unit.

### **ANALYSIS**

#### **1. Supervisory Status**

##### **a. General Principles Relating to Supervisory Status**

Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See KGW-TV, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. Id.

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people whose exercise of any of the 12 stated Section 2(11) authorities is not merely routine. In

adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" - who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In Oakwood Healthcare, Inc., 348 NLRB 686, 692 (2006), the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. Id. at 692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board recognized that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. Id. It found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[.]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary

choices. Id. Similarly, “if [a] hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse’s assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.” Id. at 693-694.

Additionally, the judgment that a putative supervisor exercises must “rise above the merely routine or clerical” for it to be truly supervisory within the meaning of Section 2(11). Id. at 693. “If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” Id.

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See KGW-TV, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. See NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). Conclusory evidence is not sufficient to establish supervisory status. See Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006).

## **2. Head Nurses**

### **a. Nursing Department and Casa de Salud**

As set forth above, the Employer uses RNs as Head Nurses in five Nursing Department subdivisions - Medical/Surgical, ER, OB/GYN–Pediatrics, OR, and Newborn/NICU - and in Casa de Salud.

In its posthearing brief, the Petitioner states that the Employer has established that the Nursing Department Head Nurses are statutory supervisors. While the Petitioner's concession does not amount to an express stipulation that the Head Nurses are supervisors, the concession marks a reversal from the Petitioner's position at the hearing. I conclude, as discussed further below, that the Petitioner's posthearing concession of the Nursing Department's Head Nurses' supervisory status is warranted.

In its brief, the Petitioner did not specifically state its position whether the Casa de Salud Head Nurse - Brenda Martinez - is a supervisor, but at the hearing it took the position that she is not. I conclude, as discussed below, that Head Nurse Martinez - like the Nursing Department Head Nurses - is a supervisor.

As set forth above, the evidence regarding the Head Nurses in the Nursing Department and Casa de Salud shows that such personnel are involved in matching RNs with particular patients. In light of the record evidence and the Petitioner's concession that the Nursing Department's Head Nurses are supervisors, I find that the process of matching RNs and patients amounts to supervisory assignment within the meaning of Section 2(11), as it is done with the use of independent judgment.<sup>10</sup>

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<sup>10</sup> I do not predicate the supervisory status of these Head Nurses on any basis other than matching RNs with patients.



In Oakwood Healthcare, Inc., 348 NLRB at 689, the Board construed the Section 2(11) term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” With regard to the health care context, the Board concluded that “the term ‘assign’ encompasses . . . charge nurses’ responsibility to assign nurses and aides to particular patients.” Id. As the Board stated, “the assignment of a nurse’s aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee . . . [and i]t may also have a bearing on the employee’s opportunity to be considered for future promotions or rewards.” Id.

In applying its independent judgment test in Oakwood, the Board elucidated its meaning with respect to charge nurses’ authority to assign available staff to particular patients. The Board made clear its view that:

[i]n the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse’s analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.

Id. at 695. The Board also stated that “where [a] charge nurse makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function ‘requir[ing] the use of independent

judgment[.]” and that “if [a] registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” Id. at 693, 698.

Accordingly, the Head Nurses in the Nursing Department and Casa de Salud will be excluded from the unit.

**b. The CIS Project**

In its brief, the Petitioner did not specifically state its position whether the CIS Project Head Nurse - Sandra Gonzales - is a supervisor, but at the hearing it took the position that she is not. I conclude that Head Nurse Gonzales is not a supervisor. The CIS Project has a Section 2(11) supervisor - Clinical Supervisor Jasmine Ortiz – who is responsible for overseeing the few RN and LPN clinical personnel. Gonzales’ role as a Head Nurse is more one of coordination than of supervision. Thus, Gonzales prime responsibility as Head Nurse is to make sure that the process of seeing patients flows smoothly, so that no patients are waiting to see the various professionals who are available to evaluate and treat patients. The other responsibilities that Gonzales has are similar to those that the non-Head Nurse RNs have (for example, directing the other RN and the LPNs to perform particular tasks, assisting with evaluations, and making recommendations regarding discipline). As explained below, those RN functions are not supervisory. Thus, the CIS Project’s Head Nurse will be included in the petitioned-for unit.

**3. RNs**

With regard to the regular RNs whose supervisory status is contested, the Employer contends that the RNs in the Nursing Department, Casa de Salud, Home

Health Services, External Clinics, the CIS Project, and Preventive Medicine are statutory supervisors based on their involvement in one or more of the following functions: assigning, directing, recommending hiring, disciplining, recommending discipline, and evaluating.<sup>11</sup> It appears that there is no contention – and also no convincing evidence to support a contention - that any of the RNs exercise any Section 2(11) authority to transfer, suspend, lay off, recall, promote, discharge, reward, or adjust grievances. For the reasons set forth below, I conclude that the RNs in the Nursing Department, Casa de Salud, Home Health Services, External Clinics, the CIS Project, and Preventive Medicine are not supervisors based on any authority to assign, direct, effectively recommend hire, discipline, effectively recommend discipline, or evaluate. Consequently, the RNs will be included in the petitioned-for unit.

**a. Authority to Assign**

As discussed above, assignment within the meaning of Section 2(11) refers to the act of designating an employee to a place, appointing an individual to a time, or giving significant overall duties to an employee. The evidence fails to demonstrate that the RNs in the Nursing Department, Casa de Salud, Home Health Services, External Clinics, the CIS Project, and/or Preventive Medicine perform such functions. Those functions are handled by higher authorities, such as Directors, Department Managers, Clinical Supervisors, Head Nurses, and other similar officials. While the RNs are involved in providing guidance and direction to other personnel to perform discrete

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<sup>11</sup> There is no issue over the supervisory status of RNs in the Nursing School and the Cardiovascular Lab. As stated above, the parties stipulated to the exclusion of the RNs in the Nursing School. As discussed further below, the stipulation will be honored. Additionally, with regard to the RNs in the Cardiovascular Lab, the evidence is clear that those RNs do not have the authority to exercise any Section 2(11) functions over other employees.

tasks, the Board made clear in Oakwood that the performance of that function does not involve Section 2(11) assignment and that providing guidance and direction is properly analyzed under Section 2(11) “responsibly to direct.” Moreover, even if it could be concluded that these RNs may have some involvement in assigning, the Employer has not demonstrated that the performance of such function requires enough discretion that it could be concluded that they exercise supervisory independent judgment rather than routine or clerical judgment.

**b. Authority to Responsibly Direct**

As stated above, the evidence shows that the RNs in the Nursing Department, Casa de Salud, Home Health Services, External Clinics, the CIS Project, and Preventive Medicine are involved in Section 2(11) direction. For such direction to be supervisory, however, the direction also must be “responsible” within the meaning of Section 2(11). Here, the evidence does not establish that the RNs’ direction of others meets the Section 2(11) standard for responsibility.

In Oakwood, the Board discussed the Section 2(11) term “responsibly to direct.” The Board held that, for direction to be “responsible,” “the person directing and performing oversight of [an] employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” 348 NLRB at 691-692. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative

supervisor if he/she does not take these steps.” Id. Such adverse consequences must materially affect the putative supervisor’s terms and conditions of employment, either positively or negatively, as a result of her performance in directing others. See Golden Crest Healthcare Center, 348 NLRB 727, 730-731 (2006). The Board has held that accountability was established, for example, where an employer issued written warnings to lead persons because of the failure of their crews to meet production goals or other crew shortcomings. See, e.g., Croft Metals, Inc., 348 NLRB 717, 722 (2006).

In this case, the evidence does not show that the RNs face adverse consequences that would make their direction “responsible” within the meaning of Oakwood. There is no evidence that the RNs are subject to any tangible effect on their terms and conditions of employment. While their licenses as RNs make them generally responsible for patient care, that sort of professional responsibility is not the same as responsibility in the sense intended in Oakwood. See, e.g., Lynwood Manor, 350 NLRB 489,490-491 (2007) (testimony from LPN that “anything [the aides] do wrong falls back on my shoulders” inadequate to establish accountability).

To be sure, the RNs’ evaluations include ratings on their direction of others, but the mere existence of such evaluation ratings is not sufficient to make the direction responsible within the meaning of Section 2(11). See, e.g., Golden Crest Healthcare Center, 348 NLRB at 731; Barstow Community Hospital, 352 NLRB 1052, 1052-1053 (2008) (same). “[W]here accountability is predicated on employee evaluations, there must be evidence that a putative supervisor’s rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person’s terms and conditions of employment.” Golden Crest Healthcare Center, 348

NLRB at 731. In this case, evidence of such an effect is absent. While the Employer asserts that the evaluations impact whether the RN can continue in employment or whether she needs to improve, it has not proved that it actually has used the evaluations to weed out poor performers or to require training. In Golden Crest, the Board held that, in the absence of actual evidence showing that an evaluation has such effects, the evaluation is insufficient to establish supervisory responsibility. Id. (nurses' direction not responsible even though evaluations rated them on their direction of others and the evaluations could be used to determine if the nurses could keep working at the facility or if they needed training).

**c. Authority to Effectively Recommend Hires**

While the evidence shows that the RNs in the Nursing Department have the authority to make hiring recommendations, such authority does not make them supervisors.<sup>12</sup> Recommendations regarding personnel action can be supervisory only if they are "effective" within the meaning of Section 2(11). The Act does not define the phrase "effectively to recommend." Under the Board's construction of that phrase, authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendations ultimately are followed. See Bellaire Medical Center, 348 NLRB 940, 954 (2006); Children's Farm Home, 324 NLRB 61, 61 (1997). Here, the evidence does not establish that the RNs' input in the hiring process is accepted without independent investigation by higher authorities. The evidence shows that Director of Nursing Burgos Rodriguez is the official who runs the hiring process and make decisions on hires, and

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<sup>12</sup> The evidence does not show that the RNs in Casa de Salud, Home Health Services, External Clinics, the CIS Project, and/or Preventive Medicine have any role in recommending hires.

she merely allows the RNs some advisory participation in that process. The Director of Nursing is actively involved in making her own judgments throughout the selection process, and it cannot fairly be said from the evidence that the RNs are the real decision-makers regarding hiring.

**d. Authority to Discipline**

The evidence shows that the RNs can verbally counsel subordinate workers to correct unsatisfactory performance. That evidence, however, does not prove that the RNs issue supervisory discipline. The Board has held that “[t]he ability to issue oral warnings in itself does not demonstrate supervisory authority.” Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999) (citing Ohio Masonic Home, 295 NLRB 390, 393-394 (1989)). See also Ken-Crest Services, 335 NLRB 777, 777-778 (2001) (authority to issue general counselings and verbal warnings not supervisory discipline).

Additionally, while the record includes testimony indicating that the RNs have the authority to write up subordinates, the write-ups appear merely to be reports to higher management about problems that the RNs have encountered with subordinates. The record does not include any evidence showing that the RNs have completed any write-ups that had any direct, tangible effect on an employee’s terms and conditions of employment. Having the mere authority to report subordinates to higher authority does not make one a supervisor. See Ten Broeck Commons, 320 NLRB 806, 812 (1996).

**e. Authority to Effectively Recommend Discipline**

The evidence does not show that the RNs in the Nursing Department, Casa de Salud, Home Health Services, External Clinics, the CIS Project, and/or Preventive Medicine have the authority to make effective recommendations of discipline. First, the

record does not include any evidence demonstrating that the RNs make any disciplinary recommendations. It appears that the RNs merely inform higher authority about the existence of problems, without recommending any particular action or result. Second, it appears that, once the RNs notify higher authorities about problems, the higher authorities take independent action to determine the proper course of action, without merely acceding to RN requests. In the absence of actual recommendations and evidence showing that higher authorities acceded to them, it cannot be said that the RNs are supervisors based on effective recommendations of discipline. See, e.g., Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999).

**f. Authority to Evaluate**

Section 2(11) does not list “evaluate” as one of the 12 identified supervisory functions. Accordingly, preparation of evaluations, without more, cannot confer supervisory status. See Norton Audubon Hospital, 350 NLRB 648, 663 (2007). The Board’s policy is that for evaluations to constitute evidence of supervisory status they must directly, by themselves, affect the wages and/or job status of the employee being evaluated or they must effectively recommend personnel action. See Franklin Home Health Agency, 337 NLRB 826, 831 (2002); Coventry Health Center, 332 NLRB 52, 53-54 (2000). In the absence of evidence demonstrating that evaluations effectively recommend personnel action, such evaluations serve primarily a reporting function, not a supervisory one. See Chevron U.S.A., 309 NLRB 59, 61 (1992)

Here, the evidence is insufficient to establish that the RNs are supervisors based on their role in evaluating other workers. The RNs provide job performance information to higher authorities to allow those officials to prepare evaluations. The evidence does



not establish that the RNs' role in providing that information amounts to providing effective recommendations. The record is not sufficient to permit the conclusion that the higher authorities lack an independent basis for the evaluations that they issue and that they merely acquiesce to the RNs' assessments.

#### **4. Managerial Status**

The Board defines managerial employees as those “who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.” Rockspring Development, Inc., 353 NLRB No. 105, slip op. at 3 (200) (citing Solartec, Inc., 352 NLRB 331, 333 (2008)). The party seeking to exclude a position as managerial has the burden of establishing the exclusion. Id.

Here, the Employer has failed to satisfy its burden to establish managerial status for any of the contested Head Nurses or RNs. The Employer has not presented specific evidence to show that those personnel are involved in developing management policy or that they are able to exercise significant discretion over managerial matters independent of established policy. Thus, the record utterly lacks evidence showing examples of actual policy formulation or subjects over which they exercise sufficient discretion to qualify them as being managerial.

#### **5. The Parties' Dispute over the Nursing Department's Instructor for Patient Education**

I conclude that the Nursing Department's Instructor for Patient Education (Luz Diaz Rosado) should be included in the unit.

First, there is no merit to the contention that the Instructor for Patient Education is a supervisor. The only potential basis for claiming that she is a supervisor is that she serves as a General Manager on some weekends. Such service, however, does not warrant excluding her from the unit. The evidence suggests that she serves as General Manager infrequently and sporadically. Individuals who serve in a supervisory position infrequently and sporadically are not supervisors under Section 2(11) who must be excluded. See Oakwood, 348 NLRB at 694 (where an individual is engaged part of the time as a supervisor and the rest of the time as a unit employee, the standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions).

Additionally, the evidence does not establish that the Instructor for Patient Education is a managerial employee. As with the Head Nurses and RNs, the Employer has not presented specific evidence to substantiate that the Instructor for Patient Education has such status.

Although the Instructor for Patient Education is not involved in direct hands-on care and treatment of patients in the same way that the regular RNs are, several factors weigh in favor of her inclusion in a unit with those RNs. The Board's rule on bargaining units in acute care hospitals establishes a strong policy favoring inclusion of all RNs in the RN unit, absent stipulations to the contrary, extraordinary circumstances, or the existence of non-conforming units. Those exceptional situations are not present here. Additionally, although the Instructor for Patient Education's duties are different from the RNs' duties, she shares interests with the regular RNs in that she does work directly with patients. Moreover, if the Instructor for Patient Education were to be excluded from

the RN unit, there does not appear to be an alternate unit in which her interests would mesh as well as they do with the other RNs. The Petitioner represents an existing unit of professionals, but the unit definition excludes RNs. Also, those non-RN professionals are engaged in very different work. As set forth in more detail in Ryder Memorial Hospital, 351 NLRB 214, 217 (2007), the unit of non-RN professionals consists largely of LPNs and various types of technicians (for example, respiratory therapy technicians, sterile supply technicians, X-Ray technicians, operating room technicians, magnetic resonance imaging technicians, and others).

#### **6. The Parties' Dispute over the Preadmissions RN**

I find that, in the exercise of her regular duties, Preadmissions RN Ruth Figueroa is not a statutory supervisor. Figueroa checks to make sure that the LPN has completed her tasks, but that monitoring does not amount to responsible direction, as the evidence does not establish that her oversight of the LPN has any material effect on her terms and conditions of employment.

It is not clear, however, whether Preadmissions RN Figueroa should be excluded from the petitioned-for unit based on her substitution for the regular head of the department, Carmen Torruellas. The evidence shows that Figueroa has filled in during unspecified periods of time when Torruellas has been on vacation or other leave, and that Figueroa had been filling in for Torruellas for approximately three weeks before the hearing closed on March 9, 2009. Given that the record closed on that date, there is no evidence as to whether Figueroa has continued to fill in for Torruellas after March 9 and, if so, for how long. Such evidence would be relevant, in order to assess whether she

serves as a supervisor on an infrequent and sporadic basis or on a regular and substantial basis.

In light of the uncertainty about Figueroa's status, I will allow her to vote subject to challenge.

## **7. The Parties' Stipulations**

I conclude that the parties' stipulations excluding the Nursing Department's Personnel Development Coordinator and Instructor for Employee Development, Casa de Salud's MDS Coordinator and Quality Improvement Coordinator, and the Nursing School Instructors do not contravene the Act or any Board policy. In the rulemaking proceeding that led to the Board's rule establishing the only appropriate units for acute care hospitals, the Board's discussion focused on RNs who engage directly in patient care. The Board did not indicate that the rule required the inclusion in the RN unit of employees who are licensed as RNs but who are not directly involved in patient care, especially when the parties stipulate to exclude them. Moreover, there does not appear to be any other Board policy that would mandate inclusion of any of the involved positions. Accordingly, the stipulations will be honored and those positions will be excluded from the unit.

## **CONCLUSION**

For the reasons stated above, I conclude that the RNs, including the Nursing Department's Instructor for Patient Education and the CIS Project's Head Nurse, are employees who may be included in the petitioned-for bargaining unit, and that the Head Nurses in the Nursing Department and Casa de Salud are supervisors who must be excluded. Additionally, I accept the parties' stipulations to exclude several positions.

Accordingly, I shall direct an election among all Registered Nurses employed by the Employer at its acute care hospital located in Humacao, Puerto Rico, including the Nursing Department's Instructor for Patient Education and the CIS Project's Head Nurse. The Preadmissions RN may vote subject to challenge.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.<sup>13</sup> Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the

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<sup>13</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**UNION INSULAR DE TRABAJADORES  
INDUSTRIALES Y CONSTRUCCIONES  
ELECTRICAS, INC. (UITICE)**

**LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. See Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, La Torre de Plaza, Suite 1002, 525 F.D. Roosevelt Avenue, San Juan, Puerto Rico 00918, on or before **June 15, 2009**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's website,

[www.nlr.gov](http://www.nlr.gov),<sup>14</sup> or by facsimile transmission to (787) 766-5478. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **NOTICE OF POSTING OBLIGATIONS**

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. See Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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<sup>14</sup> To file the list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. The Board in Washington must receive this request by **June 22, 2009**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at San Juan, Puerto Rico this 8<sup>th</sup> day of June, 2009.

/s/

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Marta M. Figueroa  
Regional Director, Region 24  
National Labor Relations Board  
La Torre de Plaza, Suite 1002  
525 F.D. Roosevelt Avenue  
San Juan, Puerto Rico 00918